as to whether the accused is covered or not by the insurance policy does no longer depend on the wording of the policy. The accused is covered by the legislative effect of that section so long as there is a policy to cover third party claims.

Some cases heard after January 15, 1968 did not consider the effects of section 79(j), for instance, *Public Prosecutor* v. *Lee Hong Kee*[6] and *Public Prosecutor* v. *Nasir*.[7] But *Velusamy & Anor.* v. *Public Prosecutor*[8] did. Suffian F.J. (as he was then) in this case sitting as a judge at Raub, held that section 79 merely provides that the restriction in the policy shall have no effect as regards the civil liability of the driver and did not affect his criminal liability. This case is followed by *Public Prosecutor* v. *Ung Ah Leng*[9] where Chang Min Tat J. (as he was then) followed *Velusamy's* case.

It would appear therefore from these two cases, although the injured third party can still recover from the insurers by virtue of section 79 yet the insurance policy itself does not cover such drivers as the policy expressly excludes any liability. In other words, the driver is not covered by the policy. The insurer is made to cover the third party by statute and not by the policy of insurance and it remains therefore that the driver is without "a policy of insurance as complies with the requirements of this part of this Ordinance". Section 75 provides for the requirements of the policy under the part. Section 75(1)(b) reads as follows:

"(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road."

The policy must insure the driver of any liability and if the policy excludes any liability then the driver is not insured under the requirements of this part of the Ordinance.

The position will therefore be if the policy insures the driver without having the insurance policy being compelled to be on risk under section 79 then the driver would be covered and on the other hand if the driver cannot sue the insurance company for breach of contract on account of the non-observation of the terms or contravening any of the conditions of the policy then the driver is not covered.

I agree with the principle decided in *Velusamy's* case above. I think each case should be decided on the terms of the policy and no reference should be made to section 79.

It is for the prosecution to prove that the policy was not in force at the time of the use. *R.* v. *Tan Hong Heng*[10] following *T.S.B. Maniam* v. *Public Prosecutor*.[11] The fact that the accused was proved to be driving the vehicle at the material time does not by itself constitute evidence that he is not covered by the policy.

Lastly, I have to consider whether a driver who drives a vehicle with an expired licence should be disqualified from holding a licence to drive for a period of at least 12 months. In cases where the driver forgets to renew his licence but he has taken a policy to cover the vehicle the third party would be protected by section 79 of the Road Traffic Ordinance. Will this case constitute special reasons which are relevant to the offence and not to the offender? Some of the special reasons appear under section 74(3) of the Ordinance which reads as follows:

"Provided that a person shall not be convicted of an offence against this section if he proves —

(a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or loan; and

(b) that he was using such vehicle in the course of his employment; and

(c) that he neither knew, nor had reason to believe that there was not in force in relation to such security as complies with the provisions of this Part."

Thus, if a driver under (c) above has reason to believe that there is a policy of insurance in force then he will not be convicted under section 74(1) and no disqualification will ensue. So, if a person genuinely forgets to renew his licence and he at the material time had no reason to believe that there is no insurance policy then he should not be disqualified. It is quite different from the case where one drives a vehicle without a road tax licence and/or completely fails to take a policy of insurance and thereby section 79(j) would come in aid of the injured person. In this case I am of the opinion that the order for disqualification should follow the conviction unless there are special reasons.

In this revision since the driver has failed to attend the court and the court does not have the opportunity to ascertain whether the third party is protected or not by reason of section 79, I have to confirm the order made by the learned Magistrate.

Order accordingly.

Solicitors: *Wilson & Co.*

NG KEE LIN v. OOI SOON ENG

[O.Cr.J. (Syed Agil Barakbah J.) March 25 and May 20, 1978]
[Alor Star — Civil Suit No. 249 of 1976]

Practice and Procedure — Consent Order — Variation — Mistake — Jurisdiction of court — Principles which the court should apply.

In this case the defendant applied that a consent order be varied or corrected. The plaintiff and the defendants were partners in a registered partnership firm. The plaintiff applied for dissolution and accounts and a consent order was made which *inter alia* ordered that the accounts of the partnerships known as Thye Huat and Eng Huat be furnished. The defendant alleged that this part of the Order was made by mistake as the accounts of those partnerships could not be produced by the plaintiff without the concurrence of the other partners who were not parties to the action.

Held: (1) the court has a jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, although the mistake was on one side only, since the court has a general supervisory control over orders made on interlocutory applications;

(2) in this case there was a specific ground of mistake which enabled the order to be varied. The resulting error of facts was sufficiently substantial to call for a variation of the Consent Order.

Cases referred to:-

(1) *Mullins* v. *Howell* (1879) 11 Ch. D. 763.

(2) *B (GC)* v. *B (B.A.)* [1970] 1 All E.R. 913.

CIVIL SUIT.

T.R. Hepworth (*K. Balasundram* with him) for the applicant/defendant.

Tan Phock Kin for the respondent/plaintiff.

Syed Agil Barakbah J.: This Notice of Motion is issued by the applicant/defendant praying that the Consent Order made in Summons for Directions of the plaintiff dated April 9, 1977 be varied or corrected as indicated in the proposed amended Order, on the ground of mistake. The reasons for saying that the said Order was consented to in error by the defendant's counsel and should not have been made in that form as stated in the affidavits (encl. 50 & 51) are that:—

(1) in respect of the partnership known as Eng Thye, the defendant's counsel was mistaken in thinking the said Order applied only to accounts subsequent to December 31, 1973 as it was pleaded at paragraph 12 of the Statement of Defence that there was in existence a settled account prior to that date whereas the said Order purports to be in respect of accounts from 1962;

(2) in so far as the Order purports to affect the accounts of the partnership known as Thye Huat and Eng Huat, the defendant is unable to comply with the said Order on the ground that the accounts of those partnerships cannot be produced without the concurrence of other partners who are not parties to this action and cannot therefore be compelled to comply.

The brief facts as shown from the pleadings are that the plaintiff and the defendant are partners of Eng Thye Company, a registered partnership firm. The plaintiff became a partner since February 1, 1962 after the death of his father and took over all his father's interests in the partnership business. The defendant became a partner since the inception of the partnership on September 1, 1947 and has been in sole control and management of the business as managing partner. It was alleged that since no proper accounts have been rendered by the defendant in spite of several written reminders, the plaintiff desired to seek a dissolution of the partnership and filed a writ praying *inter alia* for a declaration to that effect, injunctions, appointment of Receiver and Manager, an account of all profits received and for an inquiry and investigation into the same. The defendant resisted the allegations in his Statement of Defence and amongst others, (for the purpose of the present Motion), pleaded that of the period February 1, 1962 to December 31, 1973, the plaintiff never questioned the accounts so rendered and they became settled accounts between the partners.

It should be mentioned that several interlocutory applications had been made by Summons-in-Chambers and by Notice of Motion which led to separate arguments on a number of occasions and resulting in a number of interlocutory Court Orders being issued. Before the present Summons for Directions (encl. 29) filed on March 15, 1977, a Summons-in-Chambers was also filed by the plaintiff through his counsel, Mr. Tan Phock Kin (encl. 8) on August 21, 1976, pursuant to Order 15, rule 1, Rules of the Supreme Court, for an account of all profits coming to the hands of the defendant or received by any person on his behalf in respect of the partnership business of Eng Thye Co., etc. The Summons for Directions was for an order to allow the plaintiff to inspect, peruse and take copies and abstracts thereof and extracts therefrom of account books, etc. of Eng Thye Co. and the other three companies stated above for different periods and the profit and loss accounts and balance sheets of the said firms.

The two applications were called at the same time on April 9, 1977 when by consent the Order of Court was made in relation to the summons for directions (encl. 29) and which is the subject matter of the present motion. On the other hand, the summons-in-chambers (encl. 8) led to a protracted hearing, was adjourned to open court for further argument and finally on October 29, 1977, I set aside the previous order made in chambers in favour of the plaintiff and dismissed the summons with costs.

The parties are now concerned with the consent order stated above resulting from the summons for directions made at the instance of the plaintiff. The plaintiff has also filed notice of motion for a writ of attachment against the defendant for non-compliance with the consent order (encl. 45). That will depend on the outcome of the present motion.

The first question that arises is whether I have the power to make the variation order as applied for. The legal position seems to be that as far back as 1879, it was held by Jessel M.R. in *Mullins* v. *Howell*[1] that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though the mistake was on one side only, since the court has a sort of general supervisory control over orders made on interlocutory applications.

Further, the rules laid down for the enforcement of agreements do not apply to enforcing orders of the court, because the court has jurisdiction over its own orders. The court's discretion on orders made on interlocutory applications is larger than those which are final judgments. There is therefore an inherent power given to the courts to vary or correct interlocutory orders made by consent on ground of mistake as to facts. The decision was followed in the later case of *B (GC)* v. *B (BA)*.[2] Although the case concerned an application to vary a maintenance order under the Matrimonial Causes Act, 1965, which provides the court with statutory powers to the effect, Ormrod J. also dealt with other rules of the law, adopted the principle expounded in *Howell's case* and further discussed the principles on which such power ought to be exercised. I agree, with respect, that the principles the court should apply in this regard are:—

1. The court should not readily accede to such application, as to do so might undermine the value of such orders and discourage parties from agreeing unless injustice appears to have been inflicted by such orders. In that case, the court allowed the consent order to be varied because of the mistake by the husband's counsel in consenting to the sum for maintenance of the wife which was disproportionate to the husband's income and injustice would result if the order was allowed to remain.

2. The onus is on the party seeking to vary the consent order to satisfy the court that a mistake was made in consenting to the order and such mistake has resulted in an order which is clearly and substantially different from one which would probably have been made if not for the mistake. In other words, the resulting error in the order is sufficiently substantial to call for variation of the order.

3. There ought to be proof of specific mistake either by showing some facts were wrongly stated or not fully disclosed. Mere assertion that the party seeking the variation order thought at the material time that he would be able to fulfil the conditions of the order, is not sufficient.

4. The effect of a mistake on the other party must also be considered, even though it may not be possible to establish a formal estoppel in law.

5. Other considerations may also arise.

I do not agree that Rules of Supreme Court, Order 28, rule 11 or the slip rule applies in this case, as this is not a case of any clerical mistakes, accidental slips or omissions either by the parties or the officer of the court.

Now, turning to the first ground of the alleged mistake as stated in the affidavits of the defendant and his counsel, the summons for directions (encl. 29) as supported by the affidavit (encl. 28) of the plaintiff clearly state at paragraphs (A) and (B) the names of the firms and the periods for which the relevant account books and documents as particularised, which are required for the purpose of inspection and perusal thereof by the plaintiff, as a partner of the firm of Eng Thye Co. If at all there is any mistake by the defendant's counsel, Mr. Balasundaram, to my mind, he could have been confused with the summons-in-chambers (encl. 8) which was for the purpose of taking accounts. That state of mind is shown from the correspondence between the solicitors of both parties regarding the proposed inspection (attached with the plaintiff's affidavit (encl. 44)). His main ground is that since the accounts up to December 31, 1973 are settled accounts, he would not have consented to it had he realised that fact, I think he was labouring under a wrong assumption. The two applications, as stated earlier (i.e. the Summons for Directions and the Summons-in-Chambers) are separate and distinct and are not dependent on each other. Now, under section 26(i) of the Partnership Act, 1961, a partner has the right to have access to, inspect and copy any of the account books which are usually kept at the place of the partnership business. Further, the right of every partner to an account of all matters relating to partnership dealings and transactions is as incontestable as his right to a discovery. Such right devolves upon and is enforceable against a partner's legal representatives and trustees in bankruptcy. (Lindley on Partnership, 12th Edition, page 531).

With regard to settled account which have been rendered by the defendant to the plaintiff, the latter is not deprived of his right to have the same account taken under the direction of the court. This is so, if the plaintiff's intention is to impeach the account either wholly or partly on ground of fraud or mistake. If fraud is proved, the court is empowered to direct the account to be opened *in toto*, even after a lapse of considerable time (*supra*, pages 540, 541). In the present case, it should be noted that the plaintiff, in his Statement of Claim as particularised in detail, alleges wilful default or neglect on the part of the defendant. In the result, I am of the opinion that the plaintiff has a right to inspect the account books and other relevant documents relating to Eng Thye Co. as asked for, including settled accounts. That right extends to his agent unless the nature of the partnership instrument states otherwise. To deprive him of such right will result in injustice. I, therefore, do not consider any variation on that part of the order justifiable.

Turning to the second ground raised, it is submitted that the defendant is unable to comply with the said order which affects the accounts of the partnerships known as Thye Huat and Eng Huat because the accounts cannot be produced without the consent of the other partners who are not parties to the action. From the submission of Mr. Hepworth, leading counsel for the defendant, which I accept, with respect, as coming from the Bar, it appears that Thye Huat is the other partnership in which Eng Thye Co. has 60% share and which purchased a rubber estate in 1972 from Eng Huat Co. and Thye Seng Co. Eng Huat discontinued operations in 1972 and Thye Seng lasted only two years. It was submitted that the above is appreciated by the plaintiff as borne out by his issuing a writ against Thye Huat in Civil Suit No. 158 of 1977. The position of the two partnerships as stated above in relation to the inability to make available their account books, etc. has also been explained to the defendant's solicitor by letter dated May 17, 1977 from the plaintiff's solicitors (attached to encl. 44).

The legal position seems to be that the defendant cannot be compelled to produce the account books of a partnership business without the consent of the other partners who are not parties to the suit unless the absent parties interested in the books are in fact represented by the defendant on record and have no interest in conflict with theirs. The interest of the absent parties must be stated. (Lindley on Partnership, 12th Edition, page 533 under "Production and Inspection of Documents"). A similar situation arose in *Mullins* v. *Howell*, *supra*, in which the defendant, having consented to an order of court requiring him to remove the buttresses of the archway which hinders the plaintiffs' right of way, was unable to comply with the order because the landlord under whom he held the lease refused to allow him to do so. The court being satisfied there was a specific ground of mistake allowed the order to be varied in that respect.

In my considered judgment, the same principles apply to the present case. The resulting error of facts is sufficiently substantial to call for a variation of the consent order on this part. The main part of the order must remain. The second part of the order under paragraphs (A) and (B) sub-paragraph (1) must also remain. As regards the sub-paragraphs (2) to (4) inclusive under (A) and (B), the position is explained at paragraph 7(1)(a) to (i) of the Statement of Defence (encl. 9).

The principles stated above in my view apply and they should be varied by omitting the three sub-paragraphs in paragraphs (A) and (B). I make an order accordingly as stated above. Now, as regards the plaintiff's motion for writ of attachment (encl. 45), I make no order in view of the above. In the circumstances, I order that each party bears its own costs.

Order accordingly.

Solicitors: *K. Balasundaram & Co.; Thillaimuthu & Phock Kin.*